89-624

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges, does a shipper have a legal defense that it is entitled to a non-tariff rate which differs from the carrier's published rates filed with the Interstate Commerce Commission, where the ICC advises a court that collection of the applicable and lawful tariff charges would be unreasonable?

PARTIES TO THE PROCEEDING BELOW

Appellants in the court below were Maislin Industries, U.S., Inc., and its subsidiary operating companies, viz., Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the court below was Primary Steel, Inc. The Interstate Commerce Commission was permitted to intervene as a party to the proceeding in support of appellee.

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Maislin Industries, U.S., Inc., et al.*, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on July 17, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 879 F.2d 400 (8th Cir. 1989). It is reproduced as Appendix A hereto.

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* Petitioners also include the bankrupt operating subsidiaries of Maislin Industries, U.S., Inc., *viz.*, Gateway Transportation Co., Inc., Maislin Transport of Delaware, Inc., MI Acquisition Corporation, Quinn Freight Lines, Inc., and Richmond Cartage Company.

The memorandum and order of the United States District Court for the Western District of Missouri is reported at 705 F.Supp. 1401 (1988). It is reproduced as Appendix B hereto.

The ICC opinion relied upon by the District Court and Court of Appeals was issued in Docket No. MC-C-10961, *Primary Steel, Inc.* v. *Maislin Industries, U.S., Inc.* Its unreported decision appears as Appendix C hereto.

GROUNDS FOR THIS COURT'S JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1989. No petitions for rehearing were filed. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. § 10701(a) provides in relevant part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. § 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

FEDERAL JURISDICTION

The cause of action arose under Sections 10761(a) and 11706(a) of Title 49 of the United States Code. Jurisdiction of the United States District Court was invoked pursuant to Section 1337(a) of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case and others like it present an industry-wide dilemma arising from fierce competition among regulated motor common carriers following enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, July 1, 1980. That legislation accomplished major regulatory reform with a general purpose of increasing competition, efficiency, and economy within the motor carrier industry.[1] At the same time, Congress emphasized the need for continued regulation of the motor carrier industry and admonished the Interstate Commerce Commission "to stay within the

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[1] See House Report No. 96-1069, June 3, 1980, p. 3, reproduced in 1980 U.S. Cong. and Admin. News Service, at p. 2285.

powers specifically vested in it by the revised law."[2] As pertinent, entry and rate regulation were scrutinized and carefully revised to provide carriers with greater flexibility within the framework of the law.

The economic forces of supply and demand became operative and carriers began, as hoped, to discount their prices to obtain or retain market share. Some carriers were unable to survive as discounting escalated and for this and undoubtedly other reasons, motor carrier bankruptcies began to mushroom in the early 1980s. Trustees and auditors began sifting through carrier accounts and discovered that many discounts negotiated and billed by carriers, for whatever reason, were never published in tariffs on file with the ICC as required by law, 49 U.S.C. § 10761(a). Properly viewed as monies lawfully due to the estate, trustees commenced actions to recover the difference between the amounts previously received by the carriers and the amounts lawfully due under the applicable tariffs.

This case arises from an action to recover freight rate undercharges for interstate transportation services performed by Quinn Freight Lines, Inc., a subsidiary operating company of Maislin Industries, U.S., Inc. Quinn was a common carrier certificated by the ICC to engage in the transportation of property by motor vehicle in interstate and foreign commerce. Its rates, charges, rules, and regulations governing its services were maintained in published tariffs on file with the ICC. From January 1981 through mid-1983, Quinn transported 1,081 shipments for Primary Steel, Inc., a shipper of various steel products. Throughout

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[2] *Id.*, p. 2293.

this period, Quinn billed and Primary paid transportation charges which were less than the charges prescribed by Quinn's filed tariffs.

On July 14, 1983, Maislin Industries and its operating divisions filed petitions in bankruptcy. A post-petition audit of the debtors' accounts determined that Quinn had undercharged Primary by $187,923.36 on the subject shipments. Thereafter, the auditors on behalf of the bankrupt estate and pursuant to authorization of the bankruptcy court issued balance due bills to the shipper for the undercharges. These demands for additional payments were refused and the Maislin estate brought suit against Primary in the United States District Court for the Western District of Missouri to recover undercharges and prejudgment interest pursuant to 49 U.S.C. § 11706(a). Primary defended on the ground that no additional amounts were due because it and Quinn had agreed to the charges already paid. It argued that even though the negotiated rates were not published in a tariff, it would be unreasonable to permit the collection of the filed tariff charges. At the shipper's request, the district court, by order filed September 3, 1985, stayed the proceeding and referred the matter to the ICC for a determination of whether the asserted tariffs were applicable to the involved shipments, whether the tariff rates were reasonable, and whether assessing and rebilling for tariff rates higher than those agreed upon was an unreasonable practice. The court also noted that referral was appropriate because the ICC was considering adoption of a general policy addressing negotiated, unpublished rates which was an issue being raised in numerous similar court actions.

While the referred administrative proceeding was pending, the ICC on October 31, 1986, issued a policy statement in Ex Parte No. MC-177, *Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986). That proceeding was instituted at the request of shipper associations whose members were also receiving balance due bills from numerous bankrupt carrier estates for the payment of lawful but unpaid tariff charges. Following public comment, the ICC concluded that the law would not allow adoption of a rule declaring an unfiled, negotiated rate the maximum that could be collected in undercharge litigation. Nevertheless, it expressed the view that the so-called filed rate doctrine had outlived its usefulness in the pro-competitive atmosphere brought about by the Motor Carrier Act of 1980, and that the filed tariff concept should no longer preclude consideration of equitable defenses. By the same token, the Commission recognized that it had no authority to waive motor carrier undercharges or, in the absence of court referral, even entertain a proceeding involving rates on past shipments. Therefore, it offered to render advisory opinions to referring courts in which it would consider all the circumstances in a given case and advise the court whether an unfiled negotiated rate or a lawful tariff rate should apply. The Commission acknowledged that the referring court could accept or reject its opinion.

Numerous courts began referring negotiated rate undercharge cases to the ICC which conducted evidentiary proceedings through the submission of written verified statements. The referred Primary proceeding was processed in this manner, and on January 19, 1988, the ICC issued its opinion that the parties had negotiated a rate which although not published and filed with the ICC was the rate billed by Quinn and paid by Primary. It concluded that collection of the tariff charges would constitute an unreasonable practice. The ICC never found that the tariff rates were unreasonable or inapplicable although the parties submitted evidence on these issues. Primary has since abandoned any contention in these respects.

Ruling on cross-motions for summary judgment, the district court found that the ICC determination was a matter within its primary jurisdiction and was entitled to special deference unless arbitrary, capricious, contrary to law, or unsupported by substantial evidence. Concluding that ICC consideration of equitable defenses was consistent with the law and its findings were supported by substantial evidence, the court affirmed the ICC determination that collection of the tariff charges would be an unreasonable practice. In light of these conclusions, the district court did not address Maislin's request for prejudgment interest. Judgment was entered for Primary on July 25, 1988.

On August 19, 1988, Maislin filed its notice of appeal to the United States Court of Appeals for the Eighth Circuit. The ICC was permitted to intervene in support of defendant and the case was duly briefed, argued and submitted for decision to a three judge panel. On July 17, 1989, the Court issued its opinion affirming the judgment and conclusions of the district court that the issue considered is within the ICC's primary jurisdiction and that equitable defenses may be properly considered. The Court found it unnecessary to address Maislin's request for prejudgment interest.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Federal Courts Are Diametrically Split On the Proper Construction of the Interstate Commerce Act

But for the ICC's advisory opinion and its MC-177 general policy statement, the outcome of the proceeding below would have been undoubtedly different and would not warrant this Court's attention. It has been settled for over seven decades that unless the filed tariff itself is found unlawful, the legal rights of a shipper and carrier are governed by its terms and deviation therefrom is not permitted under any pretext. *Louisville & Nashville R.R. Co.* v. *Maxwell*, 237 U.S. 94, 35 S.Ct. 494 (1915) and *Square D Company* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986). Prior to the ruling below, the Eighth Circuit, like every other federal circuit, had adhered to the view that the requirements of the filed rate doctrine prohibit all equitable defenses including mistake, misrepresentation or fraud. *Missouri Pacific R. Co.* v. *Rutledge Oil Co.*, 669 F.2d 557 (1982) and *Paulson* v. *Greyhound Lines, Inc.*, 804 F.2d 506 (1986).

The ICC policy statement purporting to reinterpret the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, and the effect of its opinions in individual proceedings have spawned mass confusion and inconsistent rulings at all levels of the federal courts and in the state courts as well. The ruling below that the matter of equitable defenses is within the ICC's primary jurisdiction squarely conflicts with the recent decision of the United States Court of Appeals for the Fifth Circuit in *Matter of Caravan Refrigerated Express, Inc.*, 864 F.2d 388 (1989), rehearing denied March 1, 1989, petition for writ of certiorari pending in No. 88-1958, *sub nom. Supreme Beef Processors, Inc.* v. *Yaquinto*. That case involves an action to recover a bankrupt motor carrier's tariff charges in which the shipper contended that recovery was impermissible in view of agreed-to but unfiled rates. The district court refused the shipper's request for referral to the ICC on the ground that equitable defenses are barred as a matter of law regardless of the ICC policy statement. Judgment was entered for the carrier for recovery of the prescribed tariff charges. The Fifth Circuit affirmed holding that the asserted defense is barred as a matter of law and as such is not an issue requiring ICC technical expertise.

Although the Eighth and Fifth Circuits are the only federal circuits that have addressed this question,[3] most of the other circuits are presently considering appeals embracing the same issue. A list of those proceedings and their status is included in Appendix D hereto.

Resolution of this issue has been even more diverse in the federal district and bankruptcy courts. The negotiated rate issue exists in literally hundreds of cases pending or decided in the federal courts throughout the country. Thus far, the decisions reveal a wide split of opinion, even within the same circuit. At pretrial stages, the rulings fall into two categories: (1) negotiated rates defense calls into play the ICC's primary jurisdiction requiring administrative reference; or, (2) such a defense is statutorily barred and

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[3] The Eighth Circuit reached the same conclusion it did below in *INF, Ltd.* v. *Spectro Alloys Corp.*, 881 F.2d 546 which was argued the same day as *Maislin*, but not issued until August 3, 1989. A suggestion for rehearing *en banc* was denied on September 15, 1989.

referral would serve no useful purpose.[4] Examples of reported court decisions granting referral are listed in Appendix E hereto, and those denying referral in Appendix F hereto. In addition, courts which have initially referred this issue are split on the effect of an ICC advisory opinion upon return to the court. Some courts, as here, have deferred to and accepted such opinions, as illustrated in Appendix G, while others have rejected them as inconsistent with the law, as reflected in Appendix H. Though not intended to be all inclusive, the lists are illustrative of the widespread conflict among the federal courts.

In these circumstances, it is appropriate for this Court to exercise its supervisory powers and resolve the proper interpretation of the Interstate Commerce Act to bring about the uniformity the Act was originally designed to achieve. The rate and tariff provisions of the Act have been the linchpin of the regulatory scheme since its inception and the issue presented is of vital significance to shippers, carriers and the Interstate Commerce Commission in the proper administration of the Act. Resolution of this matter should have the practical effect of terminating or narrowing the issues in the plethora of pending or contemplated litigation of this issue.

The decisions of the Fifth and Eighth Circuits reach this Court following different procedural routes - one invoking administrative reference and the other re-

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[4] At least two courts of appeals have held that the refusal to refer this issue to the ICC is not reviewable. See *Feldspar Trucking Co.* v. *Greater Atlanta Shippers Assoc.*, 849 F.2d 1389 (11th Cir. 1988) and *Delta Traffic Services, Inc.* v. *Occidental Chemical Corp.*, 846 F.2d 911 (3rd Cir. 1988).

fusing to do so. The Court is called upon to determine which path was the correct one under the statutory scheme. A proper and uniform interpretation of the Interstate Commerce Act would be facilitated by a simultaneous review of this issue in both decisions. For this reason petitioners suggest that the Court grant both petitions and consolidate the cases for argument.

B. The Ruling Below Conflicts with Decisions of This Court

(1) Equitable Defenses Are Barred As a Matter of Law

The issue posed is certainly not novel and though it has been presented in numerous cases with varying degrees of complexity, it is surprisingly simple. The common factual thread involves an incorrect billing by the carrier at below tariff rates which resulted from an agreement of the parties or an erroneous rate quotation by the carrier, the failure to publish such rates in a tariff on file with the ICC, and the subsequent rebilling at the applicable tariff rate.

The touchstone of the controversy lies in 49 U.S.C. § 10761(a), which, like its predecessor sections, require that motor common carriers collect and shippers pay only the filed tariff rate. The statute and judicial construction thereof form the basis of the filed rate doctrine and has been governing law since the decision in *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), where it was held that the Act extinguished any common law right to a reasonable rate and substituted therefor a right to whatever rate was duly filed with the ICC, unless that rate was determined to be unreasonable or discriminatory. This Court has likewise made clear that equitable defenses to collection of the filed tariff rate are barred by the

statute. Thus, in *Louisville & Nashville R. R. Company* v. *Maxwell, supra*, the Court relying on a substantial body of precedent at the time, stated:

> Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. 35 S.Ct. at 495.

The harsh realities of this doctrine have been repeated by the Court on numerous occasions since that time and through its most recent pronouncement in 1986 in *Square D Company, supra*. Unless the filed rate is found by the ICC to be unreasonable, it must be collected. Notwithstanding that the parties submitted evidence in the ICC proceeding addressing Primary's contention that the tariff rates of Quinn were unreasonable, the ICC made no such finding. Consequently, the tariff rates were the duly submitted, lawful rates under the Act. See *Square D*, 476 U.S. at 417. The ruling below squarely conflicts with applicable decisions of this Court.

(2) The ICC Opinion Does Not Make Viable A Statutory Equitable Defense

In order to avoid *Maxwell* and its progeny, the Court of Appeals relied on the ICC's opinion that the collection of tariff charges would be an unreasonable practice. This is the crux of the case. Although the decision below is premised on the doctrine of primary jurisdiction, proper resolution of the issue presented does not require resort to this doctrine at all. Rather, the question is whether shippers have a legal right to a non-tariff rate. If the remedy does not exist as a matter of law, the primary jurisdiction of the ICC cannot be implicated to create one.

The ICC unreasonable practice finding and the lower court's deference thereto were predicated on the requirement of 49 U.S.C. § 10701(a) that a "rate . . . or practice . . . must be reasonable." Whether or not the ICC has primary jurisdiction to determine the reasonableness of a carrier's practices does not address whether a shipper has a legal right to a non-tariff rate, which is a question of law. The effect of the decision below is to permit the doctrine of primary jurisdiction to create a statutory remedy where none independently exists in either the courts or the ICC.

The same type of judicial-administrative ping pong employed below was struck down in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) and *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959). *Montana-Dakota* was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern, at rates filed with the Federal Power Commission under the Federal Power Act. The gravamen of the complaint was

that the rates violated the Act in that they were unreasonably high, that Northwestern had misled the FPC into accepting the rates, that the rates had therefore been improperly established, and that Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect. Applying the filed rate doctrine, this Court held that the complaint failed to state a cause of action, for the reason that one "can claim no rate as a legal right that is other than the filed rate, . . . and not even a court can authorize commerce in the commodity on other terms." 341 U.S. at 251.

Dealing with a dissenting opinion that the issue of rate reasonableness could be referred to the FPC, the Court noted that referral of particular issues to an administrative agency might be appropriate where the plaintiff "concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary." 341 U.S. at 253. However, under the filed rate doctrine a plaintiff has no cause of action for damages grounded on a claim that he has a right to a rate other than the filed rate. Hence, Montana's claim that, but for the fraud alleged, it would have paid a lower rate failed to state a cause of action. This Court said:

> Here the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud. 341 U.S. at 253-254.

In *T.I.M.E.*, motor carriers sued the United States, *qua* shipper, to collect freight charges. The government defended on the ground that the rates upon which they were computed were unjust and unreasonable. The district court granted summary judgment to the carriers, but the court of appeals reversed on the ground that the government was entitled to an ICC determination of the reasonableness of the tariff rates, notwithstanding the ICC's inability to award reparations on motor carrier rates for past shipments.

Relying on *Montana-Dakota*, this Court reversed, holding that the Motor Carrier Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

As here, it was asserted that a statutory cause of action or defense existed by virtue of the language in former Section 216(b) of the Act (the predecessor to present Section 10701(a)) requiring that rates, and, as here pertinent, practices be reasonable. The Court held, however, that the statutory duty to establish and observe reasonable rates and practices creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." 359 U.S. at 469. Then as now, the general requirement imposed on carriers to observe reasonable practices provides shippers no cause of action or defense for a violation of that duty.

The Court also addressed the contention that the Motor Carrier Act preserved a pre-existing common law right to a reasonable rate. Relying on *Texas &*

Pacific R. Co. v. *Abilene Cotton Oil Co., supra*, it concluded that under the statutory scheme only the ICC could determine the reasonableness of a rate and therefore any common law right was necessarily extinguished as "absolutely inconsistent" with the statute. 359 U.S. at 473. Nevertheless, the government urged that such a remedy would be consistent with the statute when coupled with referral to the ICC for a determination of the reasonableness issue as an adjunct to a judicial proceeding. The Court rejected this contention stating:

> To permit a utilization of the procedure here sought by the Government would be to engage in the very "improvisation" against which this Court cautioned in Montana-Dakota, supra, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly. In the absence of the clearest indication that Congress intended that the Motor Carrier Act should preserve rights which could be vindicated only by such an improvisation, we must decline to consider a defense which involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide. * * * * [footnote and citation omitted]. 359 U.S. at 475.

The holding in *T.I.M.E.* left purchasers of motor common carriage without any remedy whatever with respect to unreasonable rates on past shipments. In 1965, Congress created one with the enactment of Pub. L. 89-170, 79 Stat. 651, September 6, 1965. The law amended then Section 204a of the Act to provide

a cause of action against motor carriers for the recovery of "reparations", defined as "damages resulting from charges for transportation services to the extent that the Commission upon complaint made as provided in Section 216(e) of this Part, . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." Section 204a(2) and (5).[5]

There was no remedy for the exaction of unreasonable rates by a motor carrier until the Congress created one in 1965. "It necessarily follows that [that remedy] provide[s] the sole and exclusive remedy for excessive charges." *Mohasco Industries, Inc.* v. *Acme Fast Freight Inc.*, 491 F.2d 1082, 1084 (5th Cir. 1974). To the same effect is *U.S.* v. *Associated Transport*, 505 F.2d 366 (D.C. Cir. 1974). As the court there said:

> The frame and preamendment history of the Motor Carrier Act, as *T.I.M.E.* explains, evince a congressional intent to secure the reasonableness of rates through the administrative processes it prescribes, and to exclude liability of motor carriers to shippers on account of excessive rate-charging in the

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[5] The Interstate Commerce Act was recodified in 1978. See P.Law 95-473, 92 Stat. 1337, October 17, 1978. The revisions effected no substantive change. The pertinent provisions of former Section 204a, 49 U.S.C. § 304a, now appear in 49 U.S.C. § 11705(b)(3) and § 11706(c)(2). The recodified language is not a model of clarity, but it may not be construed as making any substantive change in the prior law. Examination of the prior language is required to determine the intent of Congress. *Trailer Marine Transport Corp.* v. *Federal Maritime Commission*, 602 F.2d 379, at 383, n. 18 (D.C. Cir. 1979).

> past. By the 1965 amendment, Congress has relented somewhat, but only to the extent of admitting the current reparations procedure. [footnote omitted] 505 F.2d at 369.

The language of the 1965 law is very specific in providing a reparations remedy only where the ICC finds the rates contained in a tariff to be unreasonable. The recodified language of Section 11705(b)(3) omits the reparations definition, but likewise limits the remedy to unlawful rates. The narrow reparations remedy cannot be read to provide a cause of action or defense for other statutory violations such as an unreasonable carrier practice. In this context, the Motor Carrier Act is in stark contrast with former Parts I and III of the Act dealing with rail and water carriers, respectively, which give a right of action to shippers against carriers for damages resulting from any act or omission of such carriers in violation of the Act. 49 U.S.C. § 11705(b)(2). The distinction is critical. As the Court observed in *T.I.M.E.*:

> To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act. 359 U.S. at 471.

T.I.M.E. squarely stands for the proposition that while the Act requires practices to be reasonable, it does not provide shippers a cause of action or defense against a motor carrier for violation of that duty. To that extent, no subsequent legislation has altered that holding.

(3) The Statute Extinguished Any Common Law Remedy for the Unreasonable Practice Claimed Here

T.I.M.E. also rejected the contention that the Act preserved a pre-existing common law remedy for an unreasonable charge as being "absolutely inconsistent" with the statute's design. 359 U.S. at 473. The same conclusion is even more compelling with respect to a common law claim premised on allegations of an unreasonable practice of the nature involved here. Compare *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

Assuming that the challenged "practice" is one embraced by Section 10701(a),[6] only the ICC could determine its reasonableness. As a result, any common law right is necessarily extinguished. 359 U.S. 473. *T.I.M.E.* makes clear that such a remedy cannot be resurrected by the referral mechanism to accomplish "indirectly what Congress has not chosen to give it the authority to accomplish directly." 359 U.S. at 475.

Moreover, as the Court noted in *Hewitt-Robins*, survival of a common law claim depends on the exercise

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[6] This is no small assumption. The practice declared unreasonable is a statutory command, i.e., the collection of tariff charges for which a federal cause of action is specifically provided. 49 U.S.C. §§ 10761(a), 11706(a). The ICC's declaratory finding is the practical equivalent of a waiver of these provisions, an exercise which is well beyond its jurisdiction.

of the remedy upon the statutory scheme. If the remedy is inconsistent with that scheme it does not survive. 371 U.S. at 89. Recognition of a cause of action or defense for negotiated rate agreements would completely undermine the regulatory scheme embodied by the Interstate Commerce Act.[7] To permit the parties to ignore the tariff and retain the benefits of a private rate agreement would gut the statutory tariff filing and adherence requirements which, as then Judge Scalia put it in *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C.Cir. 1986), are "utterly central" to the Act.

This is not to say that carriers may act with impunity, or that shippers have no means of protection against the practices alleged here. Prior to shipment, shippers may verify that the quoted rates are filed rates by resort to the published tariffs for which they are charged with knowledge in any event. Subsequent to shipment, shippers have a remedy to challenge the published tariff and recover reparations if the tariff is found unlawful. In addition, the statute's broad remedial provisions are designed to ensure the integrity of the tariff system and overall purpose of the Act. Thus, criminal and civil liability is imposed on carriers and shippers alike for knowing deviation from the filed tariff rate. 49 U.S.C. §§ 11902, 11903, 11904. The Commission also has broad enforcement powers over motor carriers to require compliance with their tariffs. 49 U.S.C. §§ 11701, 11702. This statutory scheme is intentional in its exclusion of a private

[7] The ICC has attempted to accomplish precisely that result. In every case referred to it thus far the Commission has found that collection of the lawful tariff charge is unreasonable where a negotiated but unfiled rate exists.

remedy which would allow certain shippers to recoup or retain the fruits of their special agreements to the disadvantage of other shippers not so fortunate.

C. No Relevant Statutory Change Permits Equitable Defenses

The Motor Carrier Act of 1980 did not alter the requirements of Section 10761(a) or make any other relevant statutory change authorizing the result below. Nevertheless, in upholding the ICC's "reinterpretation" of the filed rate doctrine, the Court of Appeals relied on the general pro-competitive thrust of the reform legislation.

This Court recently made quite clear that the general purpose of the 1980 Act is insufficient to overcome the strict requirements and harsh results of the filed rate doctrine. As stated in *Square D, supra*, " . . . harmony with a general legislative purpose is inadequate for that formidable task." 476 U.S. at 420. If the reasons underlying the filed rate doctrine are no longer sound, it is up to the legislature to change that policy.

This pronouncement takes on particular importance where, as here, Congress has carefully re-examined this area of the law and provided a specific statutory framework under which shippers and carriers can conduct business. For example, the 1980 legislation relaxed entry requirements, 49 U.S.C. § 10922; broadened the sphere of contract carriage, 49 U.S.C. § 10923; allowed carriers to operate as both common and contract carriers without prior approval of their dual status, 49 U.S.C. § 10930(a); created a zone of rate freedom to allow carriers to raise and lower rates without ICC interference, 49 U.S.C. § 10708; and en-

abled carriers to establish rates based on limited liability without prior ICC approval, 49 U.S.C. § 10730(b).

Since 1980, pursuant to specific statutory provisions, the Commission has undertaken to provide carriers with greater flexibility. It has, for example, relieved motor contract carriers, on an industrywide basis, of the requirement that they file rates with the Commission, *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150 (1983), affirmed *sub nom. Central & Southern Motor Freight Tariff Assn.* v. *United States*, 757 F.2d 301 (D.C. Cir. 1985). It has also allowed motor contract carriers to obtain permits to serve entire classes of unnamed shippers. *Issuance of Permits Authorizing Industrywide Service*, 133 M.C.C. 298 (1983), appeal dismissed in *American Trucking Associations, Inc.* v. *United States*, 747 F.2d 787 (D.C. Cir. 1984). It has actively encouraged the discounting practices of motor common carriers, *Lawfulness of Volume Discount Rates, Motor Common Carriers*, 365 I.C.C. 711 (1982). It also adopted a general rule allowing motor common carriers to respond quickly to market demand by filing reduced rates on one day's notice and increased rates on five days' notice. *Short Notice Effectiveness for Independently Filed Rates*, 1 I.C.C.2d 146 (1984), affirmed *sub nom. Southern Motor Carriers Rate Conference* v. *U.S.*, 773 F.2d 1561 (11th Cir. 1985).

Thus, Congress provided, either directly or through delegation to the ICC, the tools necessary to achieve the goals embraced by the national transportation policy. It did not, however, evince an intent to permit carriers, shippers, or the ICC to subvert the statutory tariff adherence requirements for motor common carriers and their customers. Had it desired to carve exceptions into the requirements of section 10761(a), it would have done so. See, for example, 49 U.S.C. § 10761(b), authorizing the ICC to relieve motor contract carriers from rate filing requirements;[8] and 49 U.S.C. § 10735, authorizing motor common carriers of household goods to quote binding estimates pursuant to specific statutory and regulatory procedures. The requirement that motor common carriers and shippers adhere to the published tariff rate is fundamental to the overriding purposes of the Act. To infer an intent to eradicate this doctrine is to ignore the plain language of the statute.

CONCLUSION

The issue presented in this case has already been answered by the precedent of this Court and if there is to be change in the law it should be through legislative action. However, some lower courts, including the Court of Appeals for the Eighth Circuit, have created a new judicial remedy. Other lower courts continue to follow the law applicable to collection of filed rates. The result is conflicting decisions by the bankruptcy courts, the federal district courts and the Courts of Appeals for the Fifth and Eighth Circuits.

For the reasons set forth herein, petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit, and upon review of the Record in that Court its judgment be reversed and the cause remanded to it with directions

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[8] Section 10761(b) was a part of the statutory scheme prior to 1980, but was not implemented by the ICC to apply to all motor contract carriers until after the 1980 Act.

that it be remanded to the United States District Court for entry of judgment in favor of Maislin and instructions to rule on the request for prejudgment interest.

Respectfully submitted,

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October 16, 1989

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-2267

Maislin Industries and U. S. Inc.,

Appellants,

v.

Primary Steel, Inc.,

Appellee.

Submitted: January 11, 1989
Filed: July 17, 1989

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

Appeal from the United States District Court for the Western District of Missouri.

JOHN R. GIBSON, Circuit Judge.

This case presents the issue of whether the "filed rate doctrine," which requires a motor carrier to collect the rate published in a filed tariff, obliges Primary Steel, Inc. to pay Maislin Industries and U.S., Inc. an amount greater than that which the parties negotiated. The district court affirmed a ruling of the Interstate Commerce Commission finding it unreasonable under 49 U.S.C. § 10701 for Maislin to recover tariff charges higher than those agreed to

by the parties. On appeal, Maislin challenges the district court's referral of the issue to the ICC, its subsequent affirmance of the ICC decision, and its denial of prejudgment interest. We affirm the judgment of the district court.[1]

Maislin brought this action against Primary Steel to recover freight tariff charges in the amount of $187,923.36. Quinn Freight Liners, Inc., a division of Maislin, made 1,081 shipments of steel for Primary Steel over a three year period. Pursuant to 49 U.S.C. § 10761 (1982), Maislin had filed tariffs with the ICC containing rates and charges applicable to the transportation services provided for Primary Steel. Primary Steel and Maislin, however, had negotiated a shipment rate for an amount below the filed tariff rate, with the understanding that Maislin would file the lower negotiated rate with the ICC. Maislin never filed this negotiated rate with the ICC.

Maislin and its divisions later initiated Chapter 11 bankruptcy proceedings, and the alleged undercharges were discovered by an audit agency appointed by the bankruptcy court. The claimed undercharges of $187,923.36 represent the difference between the negotiated rates paid by Primary Steel and the tariff rate filed by Maislin with the ICC.

The district court relied on the doctrine of "primary jurisdiction," referring to the ICC the questions of whether Maislin's freight rates and charges were unreasonable and whether Maislin's practice of assessing and rebilling Primary Steel for tariff rates higher than those originally negotiated by the parties constituted an unreasonable practice in violation of 49 U.S.C. § 10701(a).

The ICC relied upon its earlier decision in *National Indus. Transp. League—Petition to Institute Rulemaking on*

[1] The Honorable John W. Oliver, Senior United States District Judge for the Western District of Missouri.

Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177, 3 I.C.C.2d 99 (1986) (hereafter *Negotiated Rates*), and held that it could inquire into whether the imposition of undercharges would be an unreasonable practice under 49 U.S.C. § 10701(a).[2] Making extensive factual findings, the ICC determined that Maislin had quoted a rate other than a tariff rate to Primary Steel, that an agreement had been reached between the parties, and that Primary Steel had, in fact, reasonably relied on the rate quotation. The ICC concluded that Maislin would commit an unreasonable practice in requiring Primary Steel to pay undercharges for the difference between the negotiated rates and the tariff rates.

Both parties moved before the district court for summary judgment, Primary Steel relying on the ICC decision, and Maislin contending that the ICC decision was not binding, but only an advisory opinion, and that its decision was contrary to law. The district court found that the ICC decision resolved a question within its primary jurisdiction because the issue presented required an inquiry into the lawfulness of a carrier's practice, and that it was appropriate to defer to the special expertise and administrative

[2] 49 U.S.C. § 10701(a) (1982) provides:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission * * * must be reasonable.

49 U.S.C. 10704(a)(1) (1982) further provides:

> When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation * * * or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation.

discretion of the ICC. *See Iowa Beef Processors, Inc. v. Illinois Centr. Gulf R.R. Co.*, 685 F.2d 255, 259 (8th Cir. 1982). The district court concluded that the ICC decision, therefore, should be accorded substantial deference, and not be set aside unless it exceeded the ICC's statutory authority or was unsupported by substantial evidence. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-21 (1966).

The district court recognized that in the past courts have not permitted deviation from the filed rate required under 49 U.S.C. § 10761. *See, e.g., Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915). Further, the ICC has also refused to allow the waiver of undercharges based on ignorance or carrier misquotations. The district court, however, rejected the applicability of the filed rate doctrine, relying on the 1986 ICC policy change announced in *Negotiated Rates*. 3 I.C.C.2d 99. *Negotiated Rates* allows the ICC, upon a court's request, to determine whether collection of undercharges would constitute an unreasonable practice under 49 U.S.C. § 10701. The district court observed that the ICC had not abolished the section 10761 requirement that mandates carriers to charge the tariff rate. Rather, it changed its policy on enforcing the "unreasonable practice" provision of section 10701(a), by allowing the consideration of equitable defenses. The court held that nothing prohibits the ICC from changing its policy and that this change in policy was justified and consistent with its practices under the Interstate Commerce Act. Finally, the district court concluded that the ICC's determination, that a negotiated rate existed and that collection of the alleged undercharge would be an unreasonable and unlawful practice, was supported by substantial evidence. Summary judgment was accordingly granted in favor of Primary Steel.

I.

Maislin first argues that the issue before the district court was not within the ICC's primary jurisdiction. The issue before the ICC here was whether Maislin's practice of assessing and rebilling Primary Steel for the filed tariff rate, which is higher than the rate negotiated and paid by Primary Steel, constituted an unreasonable practice in violation of 49 U.S.C. § 10701(a). Maislin contends that this issue is a question of law and within the competence of the judiciary. In its Order of Referral, the district court, citing *Iowa Beef Processors*, 685 F.2d at 259, held that the doctrine of primary jurisdiction required it to refer the matter to the ICC, as "the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice." The court concluded that this "policy decision should be dealt with uniformly and with reference to the underlying reasons and policies for the regulations," and that it is therefore "appropriate that we defer to the special expertise, competence, and administrative discretion possessed by the ICC." In its order granting Primary Steel's motion for summary judgment, the district court rejected Maislin's contention that it improperly referred the issue to the ICC.

We are satisfied that the reasonableness of Maislin's billing practices is a matter properly within the ICC's primary jurisdiction. The Supreme Court in *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65 (1956), held that the ICC has primary jurisdiction over any matter that "raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act." Further, the doctrine of primary jurisdiction should be exercised if the issues in the proceeding "turn on a determination of the reasonableness of a challenged practice," or raise a "question of the validity of a rate or practice." *Nader v. Allegheny Airlines, Inc.*,

426 U.S. 290, 304-06 (1976). In *Iowa Beef Processors*, 685 F.2d 255, we held that the doctrine of primary jurisdiction dictated that the ICC determine, in the first instance, whether a practice provided for in a carrier's tariff is reasonable. *See also General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-432 (1940); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982).

The Eighth Circuit has not specifically addressed the application of the primary jurisdiction doctrine in a case involving an allegation of unreasonable collection of undercharges. This issue, however, was addressed by the Eleventh Circuit in *Seaboard System R.R. Co. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986), where the court held that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." Likewise, a majority of the lower federal courts presented with similar claims for undercharges have referred the issue to the ICC. *See, e.g., Delta Traffic Serv. Inc. v. Marine Lumber Co.*, 683 F. Supp. 754 (D. Or. 1987); *Motor Carrier Audit & Collection Co. v. Family Dollar Stores, Inc.*, 670 F. Supp. 644 (W.D.N.C. 1987); *In re Tucker Freight Lines, Inc.*, 85 Bankr. 426 (W.D. Mich. 1988).[3]

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[3] In *Negotiated Rates*, the ICC addressed the scope of its primary jurisdiction:

> [T]he Commission lacks initial jurisdiction to entertain challenges to the reasonableness of motor carrier rates charged in the past, or to order the waiver of undercharges. However, this does not mean that we lack authority to address the question of what rate should have been charged by a carrier (the tariff rate, the negotiated rate or some other rate) if the carrier brings an action for undercharges in district court, 49 U.S.C. §§ 10705(b)(3), 11706, and the court refers the question of whether the collection of undercharges would be an unreasonable practice to us under the doctrine of primary jurisdiction.

3 I.C.C.2d at 106-07.

The decision of whether to allow Maislin to collect undercharges directly involves the reasonableness of Maislin's billing practices. This determination requires the consideration of the facts and circumstances regarding both the existence of the alleged negotiated rate and the reasonableness of allowing Maislin to collect the undercharges. Such matters involve the special expertise of the ICC. We affirm the district court's holding that the ICC had primary jurisdiction to determine the reasonableness of Maislin's billing practices.

II.

The central argument asserted by Maislin is that the filed rate doctrine bars consideration of equitable defenses. Maislin argues that the district court erred in adopting the ICC decision which considered equitable defenses and found that it would be an unreasonable practice in violation of 49 U.S.C. § 10701 for the carrier to recover tariff charges that were higher than the charges previously agreed to by the carrier and the shipper.

Section 10761(a) of the Interstate Commerce Act requires that common carriers collect the rate published in their tariffs. 49 U.S.C. § 10761(a). In the past, a party's mistake or ignorance of the applicable tariff rate, or even carrier misquotation of the correct tariff rates, was not an excuse for paying less than the tariff rate. *See, e.g., Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). This rule, known as the "filed rate doctrine," was enforced to uphold the anti-discriminatory goals of the public tariff filing system, whereby every shipper could be assured that it was paying the same rate as other shippers for common carriage service. Requiring strict adherence to the tariff was intended to avoid intentional tariff mis-

quotation of rates as a means to offer secret discounts to particular shippers. *See* S. Rep. No. 46, 49th Cong., 1st Sess. 181, 188-90, 198-200 (1886); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1230-31 (7th Cir. 1982).

In *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom. Seaboard System R.R. Co. v. United States*, 794 F.2d 635 (11th Cir. 1986), the ICC modified its interpretation of the filed rate doctrine to permit equitable defenses in a tariff applicability case involving a rail carrier. Subsequently, in *Negotiated Rates*, the ICC addressed complaints by shippers that some motor carriers were abusing rate flexibility newly established by the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, by exploiting the ICC's traditional strict enforcement of filed tariffs.[4] Typically, shippers complained that motor carriers quoted and billed rates lower than those set forth in the tariffs and then later the carrier, or more typically its trustee in bankruptcy, would bill the shipper at the higher tariff rate. The ICC concluded: "our former policy of penalizing shippers for carriers' mistakes regardless of the circumstances is unnecessary and inappropriate to deter discrimination under today's statutory scheme." *Negotiated Rates*, 3 I.C.C.2d at 105. The ICC stated that by evaluating the circumstances of each case, it could determine if the carrier's actions constituted an "unreasonable practice."

Maislin argues that the ICC's interpretation of the filed rate doctrine in *Negotiated Rates* is contrary to law, and that the district court is precluded from applying that interpretation because of prior judicial precedent, which strictly construed section 10761 as requiring the filed rate doctrine. *See, e.g., Maxwell*, 237 U.S. 94; *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986). Maislin

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[4] The Motor Carrier Act of 1980 relaxed regulatory requirements and ICC oversight, thereby allowing far more pricing freedom and increasing competition among carriers.

relies on several Supreme Court cases which strictly construed the filed rate doctrine. In *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), the Supreme Court held that shippers could not use antitrust law to challenge the legality of tariff rates filed with the ICC, even where the carrier conspired to fix rates in violation of the Sherman Act, because the rates had been approved by the ICC. *Id.* at 415-16. In *Maxwell*, the Supreme Court held that the lawfully filed rate of the carrier must be charged by the carrier and paid by the shipper, and that a shipper is not excused from paying the full amount of the filed tariff. In both *Square D* and *Maxwell*, however, the rates enforced by the Court were presumptively reasonable because they had been approved by the ICC. Therefore, collection of those rates was mandated by law. Neither case concerned rates or practices deemed to be unreasonable by the ICC. The "courts have never held that the *Commission* lacks authority to prohibit the unreasonable collection of undercharges" under section 10701. *Seaboard*, 794 F.2d at 638 (emphasis added).

Section 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the Interstate Commerce Act elevating this section over section 10701, which requires that tariff rates be reasonable. When conflicts between the two provisions arise, "it is not for * * * [courts] to place enforcement of one doctrine above the other." *In re Tucker Freight Lines*, 85 Bankr. at 429. Instead, the proper authority to harmonize these competing provisions is the ICC. *Seaboard*, 794 F.2d at 638. The approach taken by the ICC does not abolish the filed rate doctrine, but merely allows the ICC to consider all of the circumstances, including equitable defenses, to determine if strict adherence to the filed rate doctrine would constitute an unreasonable practice.

Our position is supported by similar cases from other circuits involving the filed rate doctrine. In *Seaboard*, 794

F.2d 635, the court affirmed the ICC's decision that a railroad's recovery of undercharges would be an unreasonable practice, prohibited by 49 U.S.C. § 10701, where the carrier's tariff was unclear to the ordinary user and the shipper relied on the carrier's quotation of the applicable rate. The court concluded:

> The Interstate Commerce Act, as amended, still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those policies, though, is reposed in the ICC. * * * The Commission in this case merely refused to allow the carrier to collect its undercharge when there was no evidence that the carrier intentionally or knowingly undercharged, when waiving the undercharges was unlikely to encourage carriers to indulge in intentional discriminatory rate "misquotations," and when the shipper relied upon the carrier's continuing conduct in misleading the shipper as to the applicable rate under a confusing tariff. The Commission did not abolish the requirement of 49 U.S.C. 10761(a) that carriers must charge the tariff rate.

Seaboard, 794 F.2d at 638 (citations omitted).

Also, in *Western Transp. Co.*, 682 F.2d at 1231, the Seventh Circuit held that although it was not empowered to consider equitable defenses by waiving the filed rate doctrine:

> it does not follow that the shipper is necessarily without any remedy in a case like this. A tariff provision has to be reasonable. *See* 49 U.S.C. § 10704(a). If it is not, it violates the statute; and the Commission, either on its own initiative or on complaint, "shall take appropriate action to compel compliance with" the statute. 49 U.S.C. § 11701. If the notation requirement is, as it appears to be, entirely pointless, the Commission

> can be expected to set aside this part of the tariff * * * . * * * Wilson should have done what Iowa Beef Processors, Inc., another of Western's customers, did when sued by Western in bankruptcy court on the very tariff in issue on this case—ask for stay of the court proceedings and then ask the Commission to declare the notation requirement unreasonable.

Thus, the district court is required to enforce the tariff provisions of section 10761(a), unless the ICC, upon referral by the district court, determines that a carrier's billing practices were unreasonable and that to enforce the tariff requirement would be unlawful.

Maislin further argues that the ICC does not have the authority to change its policy concerning the filed rate doctrine as it can point to no specific statutory change in the Motor Carrier Act of 1980. We are not persuaded. In *American Trucking Ass'n, Inc. v. Atchison Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967), the Supreme Court stated:

> the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

The ICC may therefore alter its past interpretation and we must accept that change if the new interpretation is reasonable. *See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is

entrusted to administer"). Here, the ICC evaluated the effects of the relaxed regulatory requirements in the Motor Carrier Act of 1980. It concluded that giving effect to negotiated rates, through its jurisdiction to enforce "reasonable practices" under section 10701, can avoid injustice without undermining the anti-discrimination goals of the filed rate doctrine. *Negotiated Rates*, 3 I.C.C.2d 99. The ICC further explained that in light of the regulatory changes "the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between the shippers." *Seaboard*, 794 F.2d at 638 (quoting *Buckeye*, 1 I.C.C.2d 767). We believe that the ICC decision represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act.

The district court adopted the factual findings of the ICC in determining that collection of the undercharges would be an unreasonable practice. The parties do not challenge the ICC's findings of fact. Maislin continually urges that the ICC's decision was no more than advisory, relying upon language in *Negotiated Rates*. *See* 3 I.C.C.2d at 107 (stating it was undertaking an "advisory analysis"). Viewed in context, the ICC simply recognized the allocation of responsibility between it and the courts, and that after it evaluates the reasonableness of a practice, the courts retain authority to structure a proper remedy. Maislin's semantic argument is not persuasive to us. *See Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 205 (1960) (ICC decision finding rates unreasonable was "by no means a mere 'advisory opinion' ").

III.

Maislin's argument that it is entitled to prejudgment interest computed from the dates of the shipments at issue need not be addressed, as we have affirmed the district

court's determination that Primary Steel is not liable for the amount of undercharges below the filed tariff rate.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 85-0021-CV-W-JWO

MAISLIN INDUSTRIES, U.S., INC., et al.,
Plaintiffs,

vs.

PRIMARY STEEL, INC.,
Defendant.

FILED

JUL 22 1988

R. F. CONNOR, Clk.
U. S. DISTRICT COURT
WEST DISTRICT
OF MISSOURI

MEMORANDUM AND ORDERS

I

A.

Plaintiffs filed the above-styled action on January 8, 1985 to collect $187,923.26 in "undercharges" plus interest and costs, relating to 1,081 shipments of steel transported by defendant. On September 3, 1985 we entered orders granting defendant's motion to refer issues of controversy to the Interstate Commerce Commission (ICC) for determination and staying the above-styled action pending final determination by the ICC. *See* September 3, 1985 Order

at 5. On January 12, 1988 the ICC issued its final determination finding that it would be an "unreasonable practice now to require Primary to pay the undercharges." *Primary Steel, Inc. v. Maislin Industries, U.S., Inc.*, No. MC-C-10961, at 10 (ICC January 12, 1988). In so finding, the ICC expressly departed from its former policy which required the collection of undercharges, the difference between the published tariff and the amount charged at the time of shipment, no matter how unfair or unreasonable that might be in a given case.

On April 8, 1988 defendant Primary Steel "pursuant to the decision of the Interstate Commerce Commission in *Primary Steel, Inc. v. Maislin Industries, U.S., Et. Al.*, ICC docket No. MC-C-10961" filed a motion requesting the Court to enter summary judgment in its favor. Plaintiff Maislin Industries filed a cross-motion for summary judgment on May 11, 1988 contending that the ICC's above-noted decision constitutes an "advisory opinion, is not binding on the Court, is contrary to law and should not be adopted."[1]

B.

When the ICC resolves a question within its primary jurisdiction the Commission's final determination should be accorded substantial deference and should not be set aside unless it exceeds the ICC's statutory authority or is unsupported by substantial evidence. *See Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-21 (1966) ("By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their dis-

[1] In light of the ICC's January 12, 1988 decision and the pending cross-motions for summary judgment, we will enter an order lifting the stay in the above-styled case and direct the Clerk to place this case back on the active docket for the purpose of ruling the pending motions.

cretion for that of the agency."); *Erickson v. Transport Corp. v. I.C.C.*, 728 F.2d 1057, 1062-63 (8th Cir. 1984) ("the substantial evidence test is a narrow one and the reviewing court is not to substitute its conclusions for those of the Commission"); *Locust Cartage Co. v. Trans America Freight Lines, Inc.*, 430 F.2d 334, 341 (1st Cir. 1970). If the Commission departs from its former policy in resolving an issue within its primary jurisdiction, as in the instant case, it must adequately explain its change of policy in a manner sufficient to permit judicial review of the ICC's policies. *See, e.g., Seaboard System R.R., Inc. v. United States*, 794 F.2d 635, 639 (11th Cir. 1986); *Intercity Transportation Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984). For the reasons we now state, we find that the ICC's January 12, 1988 decision should be affirmed and that summary judgment in favor of the defendant should be granted pursuant to Rule 56, Fed. R.Civ. P.

II

The Interstate Commerce Commission's findings of fact in the above-styled case are supported by the substantial evidence in the record as a whole.[2] Accordingly, the Commission's findings of fact as set forth in its January 12, 1988 order are incorporated herein by this reference as our findings of fact.

A.

Plaintiffs initially contend in their suggestions in support of their motion for summary judgment that "it is clear

[2] The record before the ICC is attached to defendant's motion for summary judgment as appendices 8-12. Neither party, for the most part, contests the ICC's findings of fact. Plaintiffs, however, do contest the ICC's finding that a negotiated rate existed as to all the shipments at issue. For the reasons we set forth in part II, C of this memorandum opinion, we find plaintiffs' contention is without merit.

. . . from the ICC decision that it neither addresses nor answers a question within its primary jurisdiction." Plts' Brief at 4. We disagree.

In the ICC's January 12, 1988 decision the Commission accurately stated that this Court "referred to the commission the question of the reasonableness of the rates sought to be collected by Maislin, and whether allowing their collection would be an unreasonable practice." ICC's Order at 1. Plaintiffs do not contest that the ICC has primary jurisdiction over the former question, but rather disputes its primary jurisdiction over the latter.

This Court's September 3, 1985 order definitively ruled on a rejected plaintiffs' primary jurisdiction contention. In our order we expressly found that, *inter alia*, the question of whether "plaintiffs' practice of assessing and rebillng the [defendant] higher freight rates and charges than those originally quoted by [plaintiffs], agreed upon by the parties, confirmed in writing and billed by the [plaintiffs] constitutes an unreasonable, unlawful, unfair, and deceptive practice in violation of 49 U.S.C. §§ 10701(a) and 10761" is a question within the primary jurisdiction of the ICC. Order at 2.

In so concluding, we stated that the doctrine of primary jurisdiction has been applied where action otherwise within the jurisdiction of the Court "turns on a determination of the reasonableness of a challenged practice. *Nader, supra*, 426 U.S. at 304-05." Order at 3. We thus found that the "doctrine requires the court to refer the matter to the ICC where 'the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice.' *Iowa Beef Processors, supra*, 685 F.2d at 621." Order at 3.

We further noted that the ICC was investigating similar complaints and that "[s]uch a policy decision should be dealt with uniformly and with reference to the underlying reasons and policies for the regulations." *Id.* at 4. Thus we concluded that "it is appropriate that we defer to the

special expertise, competence, and administrative discretion possessed by the ICC." *Id.*

The Eighth Circuit has not addressed the application of the primary jurisdiction doctrine in a case, such as this, involving an allegation of unreasonable collection of undercharges. *See In re Total Transportation, Inc.*, 84 Bankr. 590, 596 (D. Minn. 1988) (noting the Eighth Circuit has not been presented with the precise question at issue). The Eleventh Circuit, however, has addressed the precise question we ruled on in our September 3, 1985 Order which plaintiffs again raise in their suggestions in support. *Seaboard Systems R.R. Inc. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986). The Eleventh Circuit, relying on *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), specifically found that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the commission." *Id.* Thus, the *Seaboard* court concluded that the Commission's action of determining whether the collection of undercharges was an unreasonable practice under the circumstances of that case was both "justified and within its jurisdiction." *Id.* 637-639.

Subsequent to our September 3, 1985 order, a plethora of lower federal courts have also addressed the precise question presented by plaintiffs' initial contention. The majority of those courts have concurred with our finding in our September 3, 1985 Order.[3] *See, e.g., RTC Transportation, Inc. v. Country Pride Foods, Ltd.*, No. CIV S86-1509-MLS/JFM, 1987 W.L. 46938 (E.D. Cal. 1987); *Motor Carrier Audit and Collection Co. v. Orval Kent Food Co.*, No. 87 C 5860, 1987 W.L. 19349 (N.D. Ill. 1987); *Delta Traffic Service Inc. v. Marine Lumber Co.*, 683 F. Supp. 754 (D. Colo. 1987); *In re Tucker Freight Lines Inc.*, 85 Bankr. 426 (W.D. Mich.. 1988); *In re Amarex, Inc.*, 74 Bankr. 378 (Bankr. W.D. Okla. 1987); *Motor Carrier Audit & Collection Co. v. Family Dollar Stores*, 670 F. Supp. 644 (W.D.N.C. 1987); *Inf, Ltd. v. Spectro Alloys Corp.*, 651 F. Supp. 1405, 1407-08 (D. Minn. 1987). For additional cases see *In re Total*, 84 Bankr. at 594 n.2.

[3] This Court is fully cognizant of and has reviewed the decisions cited by plaintiffs which are in opposition to our September 3, 1985 order. *See* cases cited in plaintiffs' brief at 13 and Exhibit 1; *see also* cases cited in *In re Total*, 84 Bankr. at 595 n.3.

We, however, take a different view. A view supported by both the Eleventh Circuit and the majority of lower federal courts.

We further note that the United States Bankruptcy Court for the Eastern District of Michigan also referred the reasonableness of the rates sought to be collected by Maislin from 32 shippers similarly situated to defendant Primary Steel. On June 30, 1988 the ICC ruled that it would be an unreasonable practice for such shippers to pay the filed rate rather than the rate negotiated by the parties. *See* ICC Decision No. MC-C-30013 (June 30, 1988).

In light of our September 3, 1985 Order and the subsequent court decisions noted above supporting our ruling, we find and conclude plaintiffs' primary jurisdiction contention is untenable and must be rejected.

B.

Plaintiffs' correlative contentions in their suggestions in support may be summarized as follows: The ICC's "practices" jurisdiction does not empower the ICC to consider equitable defenses or authorize payment of charges below those contained in a published tariff; for such a policy would violate the proscription of 49 U.S.C. § 10761(a) and the long-standing "filed rate" doctrine. Plaintiffs' contentions are essentially the same as those contained in their briefs filed before the ICC. *See* Deft's Brief, Exh. 9. We find and conclude that the ICC's action in the above-styled case is sufficiently explained, justified, and within the limits of the commission's statutory authority under 49 U.S.C. §§ 10701(a), 10704(a)(1).

The Interstate Commerce Act, 49 U.S.C. § 10762(a)(1), requires all motor common carriers to publish and file

tariffs containing their transportation rate with the ICC. The carrier is obligated to collect the rate published in its tariff (49 U.S.C. § 10761(a)) and failure to do so constitutes a criminal offense under 49 U.S.C. § 11903(a).

In the past, courts have not permitted deviation from the filed rate "upon any pretext." *See, e.g., Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) ("Ignorance of misquotation is not an excuse for either paying or charging less or more than the rate filed."). The Commission historically has also refused to order the waiver of undercharges based on ignorance or carrier misquotations. *See, e.g., Rebel Motor Freight, Inc. v. Southern Beverage Co., Inc.*, 673 F. Supp. 785, 788 (M.D. La. 1987).

This rule of law is known as the "filed rate doctrine." Courts and the ICC have refused to digress from this harsh rule or to grant waiver of undercharges for fear that such a policy might lead to intentional "misquotations" by carriers seeking to discriminate in favor of particular shippers. *See, e.g., Motor Carrier Audit & Collection Co. v. Family Dollar Stores*, 670 F. Supp. 644, 645 (W.D.N.C. 1987) (citations omitted).

In 1986, the ICC announced a change in its policy regarding the strict enforcement of tariff rates. In light of the substantial deregulation of the common carrier industry accomplished by the Motor Carrier Act of 1980, the Commission determined that the rule prohibiting equitable defenses was no longer strictly applicable in cases where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged. *See* National Industrial Transportation League - Petition for the Institution on Negotiated Motor Common Carrier Rates, ex parte No. MC-177 (Oct. 29, 1986) (hereinafter *Negotiated Rates*). The ICC's new policy, as set forth in *Negotiated Rates*, is that upon a court's request, the Commission will determine, based on all the relevant circumstances, whether collection of undercharges would

constitute an unreasonable practice under 49 U.S.C. § 10704(a) and if a negotiated rate is found to exist, whether the negotiable rate is all the carrier should be permitted to collect.

The ICC appropriately emphasized in its decision in the above-styled case that "an inflexible approach to this issue frustrates the intent of the national transportation policy to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives. On the other hand, permitting equitable defenses in limited situations, we found, comports with the spirit of the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793 (1980)." ICC's Order at 5.

The ICC decision in this case, consistent with its policy statement in *Negotiated Rates*, identified the following two statutory provisions as its authority for considering all the circumstances underlying an undercharge suit and finding that the tariff filed by motor carriers need not and should not be applied: (1) 49 U.S.C.A. § 10701(a) which provides that "a practice . . . subject to the jurisdiction of the [ICC] . . . must be reasonable," and (2) *id* § 10704(a)(1) which authorizes the ICC to order a carrier to stop a violation.

This exercise of authority, as the ICC first emphasized in its policy statement and reiterated in its order, has been confirmed by the Eleventh Circuit in *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986). The court in *Seaboard* affirmed the ICC's determination in *Buckeye Cellulose Corp. v. L & N R.R. System R.R. Co.*, 1 I.C.C. 2d 767 (1985),[4] that Sections 10701(a) and 10704(a) permit the ICC to consider a shipper's equitable defenses in a rail carrier's undercharge collection suit. *Id.* at 634. The *Seaboard* court agreed with the ICC that "changed circumstances" warranted re-examination of its previous

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[4] This Court cited *Buckeye* with approval in our September 3, 1985 Order.

policy of refusing to consider equitable defenses. 794 F.2d at 638. That case emphasized "[t]he Interstate Commerce Act, as amended, still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those policies, though, is reposed in the ICC. *Cf. Nader*, 426 U.S. at 304, 96 S.Ct. at 1987." *Id.*

Nothing prohibits the ICC from changing its policy on enforcing the "unreasonable practice" provision of section 10701(a). *Id.* at 638. *Seaboard* also found the Commission's new policy "did not abolish the requirement of 49 U.S.C.A. § 10761(a) that carriers must charge the tariff rate. The statute does not say what remedy is available if less than the tariff rate has in fact been charged and paid for past shipments. That has been worked out by the Commission and judicial decision." *Id.*

The Eleventh Circuit in *Seaboard* thus concluded that the Commission had adequately set forth its basis for its change of position and that its change was justified and consistent with the ICC's statutory mission. *Id.* at 638-39.

The majority of lower federal courts have agreed with the Eleventh Circuit's decision in *Seaboard*. *See, e.g., In re Tucker Freight Lines, Inc.*, 85 Bankr. 426, 427-30 (W.D. Mich. 1988); *Motor Carrier Audit*, 670 F. Supp. at 647-650; *Younger Transportation v. TMBR Drilling, Inc.*, No. MO-85-CA-20 (W.D. Tex. 1987). For example, in *Younger Transportation v. TMBR Drilling, Inc.*, which involved facts similar to the case at hand, the Court held that the "ICC has jurisdiction and authority to consider the circumstances surrounding complainant's claim to the benefits of an allegedly negotiated rate." Slip. op. at 5. Thus the *Younger* court upheld the ICC's finding that "[i]t is not a reasonable practice for defendant Younger to collect the tariff base rate (rather than the negotiated rate) for the shipment described in this proceeding." *Id.*

We agree with the above-noted decisions and therefore find and conclude that the ICC's change in policy and

consideration of equitable defenses in the instant case was justified and consistent with its "practices" jurisdiction under the Interstate Commerce Act.

We further find and conclude that plaintiffs' reliance on *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), and *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), is untenable. For as the ICC accurately stated in its January 12, 1988 order those cases did not involve "the question of equitable defenses to a claim for undercharges." ICC's Order at 5. Moreover, those decisions did not hold that the Commission is precluded from passing on the reasonableness of carrier practices pursuant to its express authority in Section 10701(a). *Id.* For "the portions of *Square D, supra*, reaffirming that carriers must file their rates do not mean that [the Commission] lacks the authority to find, in an appropriate case, that allowing a carrier to collect the tariff rate would be unreasonable." *Id.*

Finally, we emphasize the ICC is "not abolishing the requirement in section 10761 that carriers must continue to charge the tariff rate. Rather, the ICC is simply exercising its authority to consider all the circumstances surrounding complainant's claim to the benefits of the allegedly negotiated rate in a case by case basis." *Id.*[5]

In light of our findings that the ICC's exercise of authority in the instant case was within its primary jurisdiction and consistent with the Interstate Commerce Act,

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[5] For the same reasons noted above, we find plaintiffs' reliance on the Eighth Circuit's decision in *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (1986), is untenable. Although the Eighth Circuit has acknowledged the ICC's change in policy in *Inman Freight Systems, Inc. v. Olin Corp.*, 807 F.2d 117 (8th Cir. 1986), it has not addressed whether this exercise of authority is consistent with the Interstate Commerce Act. In *Inman* the Court simply stated that "ICC's new policy does not apply directly to this case." *Id.* at 119.

we now turn to the issue of whether the Commission's decision is supported by substantial evidence.

C.

Defendant contends that the Commission's determination that the collection of the claimed undercharges by the plaintiffs "would result in an unreasonable practice pursuant to 49 U.S.C. § 10701(a) was supported by substantial evidence." brief at 22. We agree.

After an extensive review of all the facts and circumstances in this case in light of its experience and expertise, the ICC found the following: (1) plaintiffs over a continuing period of time offered defendant transportation at various quoted rates which defendant accepted; (2) defendant reasonably relied on plaintiffs to implement properly the quoted rate; (3) plaintiffs' failure to do so, despite defendant's lack of diligence, should under the circumstances, preclude plaintiffs later collection of undercharges; (4) there is absolutely no evidence that defendant agreed to pay any more than the amount plaintiffs originally quoted and billed for each shipment; (5) there is absolutely no evidence that plaintiffs even demanded additional amounts over the amounts they billed at any time during the business relationship with defendant; and (6) defendant reasonably believed that the amounts quoted and billed by plaintiffs were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between the parties and thus, since full payment was made by defendant, plaintiffs are equitably entitled to collect no more. ICC's Order at 9-10.

Our view of the record before the ICC establishes the above findings are supported by substantial evidence. We therefore reject plaintiffs' contention that the "commission's conclusion as to the existence of a negotiated rate on all shipments is not supported by substantial evidence."

To support this position, plaintiffs argue, as they did before the ICC, that numerous discrepancies exist between the negotiated or quoted rates and those actually charged by plaintiffs. We, however, agree with the ICC's finding that such discrepancies are insignificant.[6] In light of the evidence accurately set forth in the ICC's decision, plaintiffs' contention must be rejected. *See* ICC's Order at 7-8.

In sum, we find and conclude that the Commission's determination that a negotiated rate existed and that the collection of the alleged undercharges would be an unreasonable and unlawful practice is supported by substantial evidence and thus should be affirmed. We therefore grant summary judgment in favor of defendant.

Accordingly, it is

ORDERED (1) that the stay in the above-styled case should be and the same is hereby lifted and the Clerk is directed to place the case back on the active docket. It is further

ORDERED (2) that plaintiffs' motion for summary judgment should be and the same is hereby denied. It is further

ORDERED (3) that defendant's motion for summary judgment should be and the same is hereby granted. It is further

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[6] The ICC accurately stated that "of the 400 shipments identified by Maislin, 177 show a plus or minus 1-cent difference between the rate billed and rate on the rate sheets, and another 77 show a plus or minus 2-cent difference, for a total of 254. Of the remaining 146 shipments, 76 show a difference of plus or minus 5 cents or less. The remaining shipments vary by as much as 30 cents above or below the rate sheet figures." ICC's Order at 7.

ORDERED (4) that the Clerk is directed to enter judgment in favor of the defendant and against the plaintiff on a separate document in accordance with Rule 58 of the Federal Rules of Civil Procedure.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri
July 22, 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

CASE NUMBER: 85-0021-CV-W-JWO

MAISLIN INDUSTRIES, U.S., INC., et al.

V.

PRIMARY STEEL, INC.

FILED

JUL 22 1988

R. F. CONNOR, Clk.
U. S. DISTRICT COURT
WEST DISTRICT
OF MISSOURI

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The plaintiff's motion for summary judgment should be and the same is hereby denied.

The defendant's motion for summary judgment should be and the same is hereby granted.

Entered On 7/25/88

July 22, 1988
Date

R.F. Connor
Clerk

/s/ Mark Dover
(By) Deputy Clerk

APPENDIX C

EC

INTERSTATE COMMERCE COMMISSION

No. MC-C-10961

PRIMARY STEEL, INC.

v.

MAISLIN INDUSTRIES, U.S., INC., *ET AL.*[1]

Decided: January 12, 1988

SERVICE DATE
JAN 19 1988

By complaint filed March 22, 1985, Primary Steel, Inc. (Primary or complainant) seeks a determination that it would be an unreasonable practice in violation of 49 U.S.C. 10701(a) to allow Maislin Industries, U.S., Inc. (Maislin or defendant) to collect more than the rates it allegedly quoted on 1,081 shipments of steel transported generally from Primary's Connecticut supply points to points in 12 States. Defendant filed a reply and complainant filed rebuttal.

The complaint raises issues of negotiated rates addressed in *NITL-Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986) (*Negotiated Rates*). It arises from a proceeding in the United States District Court for the Western District of Missouri (Western Division) in which defendant, through its court-appointed agent, Carrier Credit and Collection, Inc. (CCC) seeks to collect under-

[1] Gateway Transportation Co., Inc., Quinn Freight Lines, Inc., Richmond Cartage Corp., and Maislin Transport of Delaware, Inc. These companies are all affiliated with Maislin Industries, U.S., Inc.

charges from complainant in the amount of $187,923.36.[2] The court referred to the Commission the question of the reasonableness of the rates sought to be collected by Maislin, and whether allowing their collection would be an unreasonable practice.

PRELIMINARY MATTERS

Maislin filed a motion requesting that the Commission accept its Statement of Facts and Argument (in effect its reply to complainant's opening statement) one day late. (The statement was due March 26, 1987, and was received March 30, 1987.) Maislin states that it advised counsel for Primary of this request and that he had no objection. Although more than one day late, we will grant the motion and accept defendant's pleading. No prejudice will result to any party.

Maislin also moves to strike certain portions of complainant's rebuttal statement because they contain misstatements of fact and arguments based on those misstatements. Primary has replied. We will deny the motion. Maislin's objections go more to the weight to be accorded these statements than to their admissibility.

BACKGROUND

Primary is a distributor of steel products such as structural steel, plate steel, pipe steel, and beams. It distributes these products, as pertinent, from a warehouse at North Haven, CT, to customers in the northeastern and mid-atlantic States. It receives steel from various manufactur-

[2] Civil Action No. 85-0021-CV-W-1, *Maislin Industries, U.S., Inc., et al.* v. *Primary Steel, Inc.*

ers, often at the piers at Bridgeport and New Haven, CT. Sometimes it ships from these piers directly to customers.[3]

The undercharge claims relate to 1,081 shipments of steel products over a 3-year period beginning in January 1981 and ending (with two exceptions) in November 1983. Of these, 1,073 were outbound truckload movements from complainant's Connecticut facilities, primarily the North Haven facility, to 157 destinations in 12 States.[4] Approximately 70 of these outbound shipments originated at Bridgeport, and some were consigned from New Haven. Eight of the 1,081 shipments were inbound movements to North Haven. All shipments were transported by Quinn Freight Lines, Inc. (Quinn) pursuant to various rates allegedly negotiated but not published or filed.[5] CCC now seeks to collect $187,923.26 in undercharges, plus interest and costs, based on the lowest applicable published and effective tariff rates on file with the Commission on the date of each shipment.

According to Primary, Joseph Costello, manager of Primary's North Haven warehouse, negotiated rates for the involved shipments with Quinn. Sometime in 1979, Frank Kravontka, identified only as a Quinn representative, visited Mr. Costello and solicited Primary's steel traffic. Mr. Costello told Mr. Kravontka that Primary would consider

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[3] Verified statements on behalf of Primary were submitted by Murray Relis, vice-president of Primary, Joseph Costello, manager of its North Haven warehouse, James McGowan, Jr., formerly employed by Quinn Freight Lines' local agent, and David W. Donley, a principal with a transportation management and research firm.

[4] Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Pennsylvania, Virginia, and North Carolina.

[5] Although the parties use the terms "Quinn," "Quinn/Maislin," and "Maislin" interchangeably when referring to the actual carrier that transported the shipments, the preponderance of the evidence leads us to conclude that Quinn was the only carrier involved.

using Quinn if its rates were comparable to those of P&NE Trucking Co.[6] Allegedly, Mr. Kravontka later called him to advise that Quinn would meet those rate levels, and based on that representation, Primary began tendering traffic to Quinn in late 1979.

In early 1980, James McGowan, Jr. became Quinn's principal contact for Primary. Mr. McGowan worked for Joe Brennan, Quinn's local agent. His job was to obtain "special commodities" traffic for Quinn. In 1981, Mr. McGowan ostensibly negotiated a 5 percent across-the-board increase with Mr. Costello that was cleared by Bud Pardus, Quinn's director of rates at its Adamsburg, PA, headquarters. A 3-page handwritten rate sheet prepared by Primary from rate quotes supplied by Mr. McGowan was submitted in evidence. It is dated June 23, 1982, and contains over 130 points and nearly as many rates.

In late 1981, Maislin took over Quinn, but there was no real change for Mr. McGowan in operating procedures. He continued to call Mr. Pardus on all rate matters. Sometime in 1982, Mr. Costello allegedly told Mr. McGowan that Primary needed rate relief if Primary were to continue to use Quinn. According to Primary, Mr. McGowan called Mr. Pardus and told him that he wanted to cut Primary's rates by 2 cents per hundredweight and also reduce some stop-off charges. Mr. Pardus gave his approval. Mr. McGowan then agreed on an effective date for these new rates with Mr. Costello that was about 30 days later. He prepared a new rate sheet and sent copies to Mr. Costello, Mr. Pardus, and to James Stradley, Quinn's

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[6] Mr. Costello states that, although he did not have tariffs on hand, he kept abreast of the rates charged by Primary's motor carriers by a notebook containing rate sheets that his office staff prepared from rates offered Primary to various destinations. Whenever a carrier solicited freight, Mr. Costello referred to this notebook to advise it of the going rate level the carrier had to match to be considered. Carriers' freight bills were also checked against these rate sheets by office staff.

regional manager. A copy was submitted in evidence. This rate sheet is typewritten, three pages in length, and contains various rates for about 140 destinations. The letterhead contains the address of Quinn's special commodities division at Adamsburg. The top of the first page contains this statement: "Rates and charges agreed upon with Joe Costello, Primary Steel North Haven, Conn. effective 8/9/82." On the last page, it is noted: "In compliance with your wishes the above rates represent a 2ct. cwt reduction and the Stop-off Charges will be reduced 5%. . . ." It is signed "Jim."

Subsequently, Primary states, when rates were needed for points other than those shown on the rate sheet, Mr. Costello or someone in his office contacted Mr. McGowan. Mr. McGowan then checked the mileage involved, set a new rate level based on the existing rate sheet, and cleared the rate with Mr. Pardus. He then notified Primary. Mr. Costello stated that he understood that Mr. McGowan got approval for all new rates from Adamsburg. The copy of the second rate sheet submitted by Primary contained more than 50 rates and points subsequently written in by hand by Primary personnel. The rates shown on the second rate sheet were in use from their effective date until Quinn's bankruptcy.

Mr. McGowan states that he considered all rates which he quoted Primary to be "protected rates," which he defines as rates that he had agreed on with the shipper and which had been approved by Quinn's top management. Mr. McGowan states that every arrangement on rates with Primary was done with the prior approval of Quinn's home office. Mr. Costello states that Quinn never sent him an actual tariff, that he had no training in tariffs, and that he relied solely on the rate sheets to check rates. However, he understood that Quinn would do whatever was necessary to implement the agreed upon rates.[7] Quinn, for the

[7] During the time period involved here, the negotiated but unfiled rate issue had yet to arise and come before us. Filed tariffs were required and a shipper's ignorance of that requirement was no excuse for not applying them. *See* discussion *infra*. Nothing in the record indicates that Primary knew when it used Quinn's service that tariffs were not yet filed or effective. Thus while Mr. McGowan considered the rates to be "protected," under his definition, no illegal rebating issues appear to be involved here.

most part (*see* discussion *infra*), billed Primary at these rates, and Primary paid the bills without incident.

DISCUSSION AND CONCLUSIONS

This proceeding involves regulated interstate shipments for which the rates originally charged were less than the lawful tariff rates on file with the Commission. Common carriers subject to the jurisdiction of the Commission must publish and file with the Commission tariffs setting out the rates and charges for their services, and generally may not charge or receive compensation different from that specified in those tariffs. 49 U.S.C. 10761 and 10762. However, Primary asserts that in this instance the tariffs applied to the involved shipments by CCC should not be used, and that rates were negotiated with Quinn and paid. Conversely, Maislin urges that the tariffs cited by CCC are applicable to complainant's shipments, and that the cited tariff rates are reasonable. It relies primarily on the argument that the Commission has no authority to advise or authorize payment of charges below those contained in a published tariff. As this is a jurisdictional argument, we will address it first, with reference to our policy statement in *Negotiated Rates* and relevant court decisions. We will then determine whether or not tariff rates are applicable to the involved shipments or whether negotiated rates existed. Finally, we will analyze the facts consistent with our *Negotiated Rates* policy to determine the amount of payment defendant equitably should be allowed to collect.

1. *Negotiated rates versus filed rates in general.* Maislin argues that the filed rate doctrine and 49 U.S.C. 10761(a)

bar equitable defenses to the collection of undercharges. It maintains that, while the Commission has prospective and retrospective remedial power over unreasonable rates, its authority over practices is prospective only. It asserts that, under section 10704(b)(1), if the Commission decides that a motor carrier's practice is unlawful, it can only prescribe future conduct; it cannot retroactively nullify filed rates on the basis of unreasonable past practice. Thus, defendant concludes that complainant's equitable claims are invalid as a matter of law, and that the Commission is without authority to declare collection of the tariff rates unlawful or to declare the negotiated rates applicable to the involved traffic.

In the past, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate. *See, e.g., Louisville & Nashville* v. *Maxwell*, 237 U.S. 94, 97 (1915); and *A.J. Pool* v. *Chicago B.I.O.*, 12 I.C.C. 418 (1907). However, we noted in No. MC-C-30025, *Manufacturers Consolidation Service, Inc. - Petition for Declaratory Order* (not printed), served November 27, 1987, one of our most recent decisions under *Negotiated Rates*, that recent Commission decisions have reexamined this issue. In *Buckeye Cellulose Corp.* v. *L&N R.R. Co.*, 1 I.C.C.2d 767 (1985) (*Buckeye*), *aff'd sub nom. Seaboard System R.R. Co., Inc.* v. *United States*, 794 F.2d 635 (11th Cir. 1986) (*Seaboard*), we recognized the shipper's equitable defenses in a tariff applicability case involving a rail carrier. We explained there that our prior practice of generally refusing to order the waiver of undercharges based on carrier rate misquotations resulted from concern that granting such relief might have led to intentional "misquotations" by other carriers seeking to discriminate in favor of particular shippers. In *Buckeye*, however, we concluded that penalizing a shipper for the mistakes of a carrier may be unnecessary to deter discrimination in today's more flexible pricing atmosphere. Our determination was affirmed in *Seaboard*.

Subsequently, in *Negotiated Rates* we took a fresh look at the proper regulatory response to the matter of unfiled negotiated motor carrier rates. We explained that an inflexible approach to this issue frustrates the intent of the national transportation policy to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives. On the other hand, permitting equitable defenses in limited situations, we found, comports with the spirit of the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793 (1980).

Defendant's assertion that the charges contained in an applicable tariff must be assessed regardless of the circumstances is, in our opinion, no longer valid. The decisions in *Seaboard*, *Negotiated Rates*, and *Buckeye* confirm that sections 10701(a) and 10704 give us the authority to consider all the circumstances surrounding an undercharge suit. Although section 10761 requires that carriers must charge the tariff rate, "the statute does not say what remedy is available if less than the tariff rate has in fact been charged and paid for past shipments." *Seaboard*, *supra* at 638.

We have considered and discussed these jurisdictional arguments at length in a number of recent decisions, including *Wakefern Food Corp.* v. *Southwest Frgt. Lines, Inc.*, 3 I.C.C.2d 814 (1987). In that case, we held invalid assertions that the charges contained in an applicable tariff must be assessed regardless of the circumstances. We concluded that the decisions in *Negotiated Rates* and *Buckeye* confirm that sections 10701(a) and 10704 give us the authority to consider all the circumstances surrounding an undercharge suit. We adopt the reasoning of those cases here.

In sum, our jurisdiction over unreasonable practices gives us discretion to find that the tariff rate filed by motor carriers need not and should not be applied in a particular case. As we explained in *Negotiated Rates*, neither *Square*

D Co. v. *Niagara Frontier Tariff Bureau*, 476 U.S. ___, 90 L.Ed.2d 413, 106 S.Ct. 1922 (1986), nor *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986), involved the question of equitable defenses to a claim for undercharges. Nor do those decisions indicate that the Commission is precluded from passing on the reasonableness of carrier practices pursuant to its express authority in section 10701(a). We are not abolishing the requirement in section 10761 that carriers must continue to charge the tariff rate. Rather, the issue is simply whether we have the authority to consider all the circumstances surrounding complainant's claim to the benefits of the allegedly negotiated rate. The portions of *Square D*, *supra*, reaffirming that carriers must file their rates do not mean that we lack the authority to find, in an appropriate case, that allowing a carrier to collect the tariff rate would be unreasonable.

Our role in such cases is to undertake an analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts, and to determine: (a) whether collection of undercharges based on the rate contained in the published tariff would constitute an unreasonable practice and; (b) if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect. *Negotiated Rates*, *supra*.

2. *The existence of negotiated rates.* It is clear that negotiations took place between Primary, represented either by Mr. Costello or by another person on his staff, and Quinn, represented by Mr. McGowan, prior to movement of the shipments in question. Further, there is evidence of offers, acceptances, and approvals by the involved parties.

While the record is not clear whether Mr. Kravontka was a Quinn employee or local agent, or whether any of the rates negotiated by him in 1979 were still in effect in

1981 and applied to any of the involved shipments, it does show that Mr. McGowan replaced Mr. Kravontka as Primary's contact at Quinn in 1980. It also reveals that the first negotiations by Mr. McGowan and Mr. Costello occurred sometime in 1981 when a 5 percent across-the-board rate increase took place. Since the first shipment involved here moved in January 1981, it is possible that some of the involved 1981 shipments moved prior to the 5 percent increase and at the rates negotiated by Mr. Kravontka.

However, the preponderance of evidence leads us to conclude otherwise. David W. Donley, a transportation consultant, submitted a statement and exhibit on behalf of Primary in which he compared the rate levels contained on the two rate sheets to the rate levels originally assessed by Quinn and paid by Primary on each of the 1,081 shipments. His comparison shows that the rate sheet rate levels, with some exceptions to be discussed later, were in fact applied by the carrier.[8] During the first 5 months of the year, only five shipments moved—on January 31, February 21, February 24, April 8, and April 14. The rate levels on these shipments matched those on the rate sheet or differed by a penny or two. The rate levels on the remaining 1981 shipments (nearly 500) matched in a similar way. Significant differences, then, do not exist, and we conclude that the rates applied to the 1981 shipments were those negotiated by Mr. McGowan. In addition, we note that defendant apparently does not dispute this because it does not address any of its comments or argument specifically to its dealings with Mr. Kravontka or to the applicability of the rates he negotiated.

As noted, the specific rates negotiated are evidenced by the two rate sheets dated June 23, 1982, and August 9,

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[8] Mr. Donley states that the rates on the first rate sheet include a fuel surcharge mandated by the Commission on April 23, 1982. To determine the specific rates used prior to April 23, Mr. Donley deducted 18 percent from each rate on the rate sheet.

1982. Those sheets collectively list more than 150 destinations with individual rates from either Bridgeport or North Haven or both. The rates range generally from about 54 cents to $1.59 per hundredweight. The second rate sheet, prepared for the most part by Mr. McGowan, is, on its face, applicable only to traffic moving after August 9, 1982. We conclude that this presents valid evidence of the actual rates negotiated for the movement of shipments from that date onward. Furthermore, it contains numerous new rates for new points written by Mr. Costello's office staff after Primary received the initial typed copy. We find this evidence probative of the existence of negotiated rates.

The record shows that a uniform procedure was followed whenever the need for a new point-to-point rate arose. Mr. Costello or a member of his staff called Mr. McGowan, who then checked the mileage involved and arrived at a rate based on similar existing rates. He always called Adamsburg for approval, and then advised Primary of the approved rate. This rate was then entered on the rate sheet, and Quinn began to move the traffic. In these circumstances, we conclude the second rate sheet establishes the specific rates negotiated for the movement of traffic after August 9, 1982.

We are less comfortable with the first rate sheet than with the second because it is dated a considerable time after the shipments began to move. However, despite the fact that it is dated June 23, 1982, we conclude that it establishes the specific rates negotiated for the movement of traffic beginning in January 1981 and ending at the time the second rate sheet took effect. We reach this conclusion because the record is clear that negotiations took place: the rates on this rate sheet are confirmed by those on the second which used them as a base; and the evidence shows that, with a few exceptions, the rates billed by Quinn prior to August 9, 1982, were in fact those contained on the first rate sheet.

3. *Billing discrepancies.* In support of its position that negotiated rates did not exist, defendant argues that numerous discrepancies exist between the rates shown on the two rate sheets and those actually charged by Quinn. It states that an examination of Mr. Donley's exhibit shows that on 400 of the 1,081 shipments the billed rate differed from the rate sheet rate. Defendant argues that the number of these discrepancies cannot be rationalized as isolated aberrations, and undermines complainant's assertion that it relied on the rates shown on the rate sheets. Maislin concludes that Primary should not now be permitted to claim any benefits from rates which it evidently did not consider itself bound to at the time.

We are unpersuaded by defendant's arguments because most of the differences are insignificant. While we cannot explain every discrepancy, our review of Mr. Donley's exhibit with respect to the 1,081 shipments involving more than 150 points under the two sets of rates reveals the following. Of the 400 shipments identified by Maislin, 177 show a plus or minus 1-cent difference between the rate billed and rate on the rate sheets, and another 77 show a plus or minus 2-cent difference, for a total of 254. Of the remaining 146 shipments, 76 show a difference of plus or minus 5 cents or less. The remaining shipments vary by as much as 30 cents above or below the rate sheet figures. Further analysis reveals that approximately 150 of the 400 shipments were billed by Quinn at a rate higher than the rate sheet rate (of these, 57 were at a rate 1 cent higher, and 20 were at a rate 2 cents higher), and about 250 of the 400 shipments were billed by Quinn at a rate lower than the rate sheet rate.

The evidence suggests that some of the 1-cent differences can be attributed to the method of fuel surcharge fold-in. Apparently, for purposes of rate quotation, a simple 1-step fold-in process was used that involved rounding the resultant figure to the nearest penny only once, but for purposes of billed rates, a 2-step process was used that

involved two roundings to the nearest penny. This accounts for some of the few cent differences. Further, Mr. Costello testified that differences of a penny would not have raised any concerns at Primary, and we find differences of 2 cents not significant either considering the large number of shipments and individual rates at issue here. As to the 73 shipments that Quinn billed Primary at rates more than 2 cents over the rate sheet rates, we conclude they are not significant when compared to the total number of shipments over the 3-year period. The majority of the 1,081 shipments show no discrepancy whatsoever between the billed and rate sheet rates, and the majority of the remaining shipments show no significant discrepancy. It is likely that laxity on the parts of both carrier and shipper was to blame for any differences, and that Quinn apparently misbilled and Primary apparently either failed to detect the misbillings or concluded they did not merit the cost of pursuing overcharge claims. Accordingly, this does not change our conclusion that negotiated rates existed for the 1,081 shipments and that these rates were reflected on the two rate sheets.

4. *Was there a reasonable basis for shipper to reiy on representations made?* The evidence of record shows that Mr. McGowan negotiated on behalf of Quinn and offered Primary rates that were approved in each instance by Mr. Pardus, Quinn's director of rates. Primary's Mr. Costello understood that all rates offered to Primary were approved by Quinn's Adamsburg office. Further, a written rate sheet that confirmed these rates was given to Primary. In these circumstances, we conclude that Primary could legitimately rely on representations made by a carrier's local agent and approved by the carrier's director of rates. Clearly, the quoted rates were established by individuals whose positions and actions reasonably induced the shipper's reliance on the arrangement.[9]

[9] The fact that Mr. McGowan was actually an employee of Quinn's local agent, Mr. Brennan, does not affect this conclusion. For all practical purposes, in his negotiations with Primary Mr. McGowan became the actual agent. In any event, by billing Quinn at the quoted rates, Quinn thereby accepted them.

Finally, we note that Maislin's use of local, commissioned agents to obtain traffic was apparently a widespread practice. In other similar proceedings before the Commission involving Maislin, over 40 shippers, and many thousands of shipments,[10] the evidence shows that it was Maislin's practice to use local agents to solicit traffic for the Maislin carriers and negotiate rates, subject to approval from Maislin management.

5. *Application of the Negotiated Rates policy. Negotiated Rates* was intended to temper the harsh effects of the filed rate doctrine when it could be shown that the shipper and carrier negotiated and agreed on a rate that was not published in a tariff. Such a showing has elements of contract law, *e.g.*, offer, acceptance, reliance, etc. In *Buckeye*, we discussed the shipper's good faith reliance on a carrier's long-term rate misquotation, and concluded that the shipper should not later be penalized for, in those circumstances, reasonable reliance on the carrier's representation. In that case, there was: (1) evidence showing a long period of misquotation; and (2) direct testimony of oral and written communications with the carrier during which the misquote was confirmed.

Primary alleges that defendant engaged in a pattern of deceitful business practices from which it should not benefit. The evidence, however, does not disclose a pattern

[10] We take official notice of the proceedings in No. MC-C-10983, *Fort Howard Paper Company* v. *Maislin Industries, U.S., Inc., et al.* (not printed), served August 12, 1987, as corrected by notice to the parties served August 28, 1987; No. MC-C-30013, *A.J. Hollander Company, et al. - Petition for Declaratory Order* (pending); No. MC-C-30007, *Auto Specialties Manufacturing Co., et al. - Petition for Declaratory Order* (pending); and No. MC-C-30030, *Packerland Packing Company, Inc.* v. *Maislin Industries, U.S., Inc., et al.* (pending.)

of continuing deceit. Quinn's employees or agents regularly quoted Primary rates on steel traffic from 1979 through 1983. Following negotiations, the quoted rates were accepted by Primary and approved by Quinn's supervisory personnel. Traffic then moved at these rates, Primary was billed at them, and it paid all charges in full. The most that can be said in this regard is that Quinn actively negotiated to obtain Primary's business and that it lowered its rates to meet the competition from at least one other carrier. While Quinn may not have taken appropriate steps to legalize the quoted rates, it has not been demonstrated that this occurred as a result of any intent to engage in unlawful conduct. What emerges from a review of this record is that Quinn attempted to obtain, in a vigorous competitive manner, Primary's traffic. It then failed to provide (for unknown reasons) for the publishing and filing of those rates.

For its part, Maislin faults Primary for failing to discover that the billed rates did not conform to effective governing tariff rates, and it argues that this failure precludes Primary from escaping responsibility for the undercharges. Maislin contends that Primary had ready access to any tariff it desired to examine. It could have demanded a copy from the carrier or obtained a copy from the Commission or from any number of tariff watching services. Instead, Primary chose to do business on the strength of telephone conversations. That business judgment, it argues, does not warrant relief from the payment of lawful tariff charges.

We have addressed this argument before. In *Fort Howard, supra* at note 10, the shipper not only subscribed to tariff services but also had copies of Maislin's actual tariffs on hand. Nevertheless, we found that this did not negate the existence of a negotiated rate, nor did it preclude us from applying in that situation the policy announced in *Negotiated Rates*. Slip op. at 5. Additionally, in No. MC-C-30032, *Mitchell Milling Co., Inc. - Petition for Declaratory Order* (not printed), served October 22, 1987, we found not necessarily controlling the fact that the shipper admitted to an ignorance of tariff filing requirements, although we decided it would be considered in weighing the equities. Slip op. at 3. We see no reason to depart from the reasoning of these cases here.

The evidence, then, discloses that, over a continuing period of time, Quinn offered Primary transportation at the involved rates and that Primary accepted those offers. Primary relied on Quinn to implement properly the quoted rates. Quinn's failure to do so, despite Primary's lack of vigilance, should, in these circumstances, preclude Quinn's later collection of undercharges. There is absolutely no evidence that complainant agreed to pay any more than the amount defendant originally quoted and billed for each shipment. There is no evidence that Quinn ever demanded additional amounts over the amounts it billed at any time during its business relationship with Primary. We find that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Primary and Quinn, and that, since full payment was made by complainant, defendant is equitably entitled to collect no more.

SUMMARY

A decision in favor of the shipper under the *Negotiated Rates* precedent requires two basic findings: (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper legitimately could rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the rate quotation.

In this case, the evidence shows that Quinn's local agent, Mr. McGowan, quoted Primary a series of rates over a

continuing period of time, and that Quinn's director of rates approved these rates. Primary, moreover, reasonably relied on Mr. McGowan and his quotations in view of the fact that it was told the quotations were approved by top management and it received a written rate sheet reflecting the agreed to rates. In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Maislin's motion to file its Statement of Facts and Argument late is granted.

2. Maislin's motion to strike is denied.

3. This proceeding is discontinued.

4. A copy of this decision will be mailed to the United States District Court for the Western District of Missouri (Western Division).

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX D

APPELLATE PROCEEDINGS INVOLVING NEGOTIATED RATES ISSUE

U.S. Court of Appeals	Case and History	Status
First Circuit	No. 89-1662, *Delta Traffic Service, Inc., et al.* v. *Transtop Incorporation.* On appeal from decision of U. S. District Court for the District of Massachusetts denying referral and granting judgment for recovery of tariff charges.	Pending
Second Circuit	No. 88-9057, *Delta Traffic Service, Inc., et al.* v. *Appco Paper & Plastics Corp.* On appeal from decision of U.S. District Court for Eastern District of New York denying referral and granting judgment for recovery of tariff charges.	Pending (argued August 17, 1989)
Third Circuit	No. 89-1130, *Branch Motor Express Company* v. *Caloric Corporation.* On appeal from decision of U. S. District Court for Eastern District of Pennsylvania rejecting ICC opinion and granting judgment for recovery of tariff charges.	Pending (argued June 27, 1989)

U.S. Court of Appeals	Case and History	Status
Fourth Circuit	No. 89-3259, *Langdon M. Cooper, Trustee and Mark & Assoc. of North Carolina, Inc.* v. *Delaware Valley Shippers Assoc., Inc.* On appeal from decision of U. S. District Court for Western District of North Carolina adopting ICC opinion and denying recovery of tariff charges.	Pending
Fifth Circuit	No. 88-1209, *Matter of Caravan Refrigerated Cargo, Inc.* Appeal decision of U. S. District Court for Northern District of Texas denying referral and granting judgment for recovery of tariff charges.	Decided February 2, 1989. Pending on petition for writ of certiorari in No. *88-1958*.
Sixth Circuit	Nos. 89-5108, 89-5110, *James B. Orr and Highway Express, Inc.* v. *Sewell Plastics, Inc.* On appeal from decision of U. S. District Court for Western District of Tennessee adopting ICC opinion and denying recovery of tariff charges.	Pending

U.S. Court of Appeals	Case and History	Status
Seventh Circuit	Nos. 89-1329, 89-1330, *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Electric Corporation.* On appeal from decisions of the U. S. District Court for the Northern District of Illinois.	Pending
Eighth Circuit	No. 88-2267, *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.* Appeal from decision of U. S. District Court for Western District of Missouri adopting ICC opinion and denying recovery of tariff charges.	Decided July 17, 1989, affirming district court. Pending on Petition for Writ of Certiorari

U.S. Court of Appeals	Case and History	Status
	No. 88-5324, *INF, Ltd.* v. *Spectro Alloys Corp.* Appeal from decision of U. S. District Court for District of Minnesota rejecting ICC opinion and granting judgment for recovery of tariff charges.	Decided August 3, 1989, reversing district court. Petition for Writ of Certiorari to be filed.
Ninth Circuit	No. 89-35115, *Delta Traffic service, Inc.* v. *Weyerhauser Co.* On appeal from decisions of U. S. District Court for District of Oregon adopting ICC opinions and denying recovery of tariff charges.	Pending (Argued October 3, 1989)
Eleventh Circuit	No. 89-8450, *Feldspar Trucking Co.* v. *Greater Atlanta Shippers.* On appeal from decision of U. S. District Court for Northern District of Georgia granting judgment for recovery of tariff charges.	Pending

APPENDIX E

REPORTED FEDERAL COURT DECISIONS REFERRING NEGOTIATED RATES ISSUE TO ICC

District of Columbia - *Maislin Transport* v. *House of Wines*, 1987 Fed.Car. Cas. Para. 83,316 (D.D.C. 1987)[1]

Georgia - *Delta Traffic Service, Inc.* v. *Knight-Ridder Newspaper Sales, Inc.*, 691 F.Supp. 339 (N.D.Ga. 1988)

Illinois - *Tobler Transfer* v *Caterpillar*, 74 B.R. 373 (Bankr. Ct., C.D.Ill. 1987)

Michigan - *Tucker Freight Lines* v. *United Exposition*, 85 Bankr. 426 (W.D.Mich. 1988); affirmed affirmed 1988 Fed.Car.Cas. Para. 83,400)

Minnesota - *INF, Ltd.* v. *Spectro Alloys Corp.*, 651 F.Supp. 1405 (D.Minn. 1987)

North Carolina - *Motor Carrier Audit & Collections* v. *Family Dollar Stores*, 670 F.Supp. 644 (W.D.N.C. 1987)

Oklahoma - *In re: Amarex, Inc.*, 74 Bankr. 378 (Bkr. Ct.W.D. Okla. 1987)

Oregon - *Delta Traffic Services* v. *Marine Lumber Co.*, 683 F.Supp. 754 (D.Ore. 1987)

Pennsylvania - *Breman's Express Company* v. *H & H Distributing Co., et al.*, 1987 Fed.Car.Cas. Para. 83,299 (Bankr. Ct. W.D.Pa. 1987)

Wisconsin - *G.M.W., Inc.* v. *Flambeau Paper Corp.*, 623 F.Supp. 423 (W.D.Wisc. 1985)

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[1] Citation refers to Federal Carriers Cases reported and published by Commerce Clearing House, Inc.

APPENDIX F

REPORTED FEDERAL COURT DECISIONS DENYING REFERRAL OF NEGOTIATED RATES ISSUE TO ICC

California - *West Coast Truck Lines* v. *Kaiser Aluminum & Chemical*, 1987 Fed.Car.Cas. Para. 83,336 (N.D. Cal. 1987)

Colorado - *Motor Carrier Audit & Collection* v. *United Food Service*, 1987 Fed.Car.Cas. Para. 83,326 (D.Colo. 1987)

Connecticut - *Delta Traffic Services* v. *Georgia Pacific Corp.*, 684 F.Supp. 769 (D.Conn. 1987)

Georgia - *Feldspar Trucking Co.* v. *Greater Atlanta Shippers Ass'n.*, 683 F.Supp. 1375 (N.D.Ga. 1987)

Louisiana - *Rebel Motor Freight, Inc.* v. *Southern Beverage Co., Inc.*, 673 F.Supp. 785 (M.D.La. 1987)

Minnesota - *Total Transportation, Inc.* v. *Armour & Co.*, 1988 Fed.Car.Cas. Para. 83,369 (D.Minn., 4th Div. 1988)

Missouri - *Campbell Sixty Six Express* v. *H.A. Cole Products Company*, 1989 Fed.Car.Cas. Para. 83,469 (Bkrtcy Ct., W.D.Mo. 1988)

New Jersey - *Oneida Motor Freight, Inc.* v. *Felsway Corp.*, 1988 Fed.Car.Cas. Para. 83,346 (Bkrtcy. Ct., D.N.J. 1987)

New York - *Delta Traffic Services* v. *Appco Paper & Plastics Corp.*, 1989 Fed.Car.Cas. Para. 83,426 (E.D.N.Y. 1988)

North Carolina - *Observer Transportation* v. *Service Merchandise*, 1989 Fed.Car.Cas. Para. 83,418 (W.D.N.C. 1988)

Ohio - *Delta Traffic Service* v. *E.L. Mustee & Sons*, 1988 Fed.Carr.Cas. Para. 83,407 (N.D.Ohio 1988) (vacating prior order of referral)

Pennsylvania - *Oneida Motor Freight, Inc.* v. *Pride Health Care*, 1987 Fed.Car.Cas. Para. 83,345 (M.D.Pa. 1987)

Tennessee - *Rebel Motor Freight, Inc.* v. *Muehlstein and Co., Inc.*, 1989 Fed.Car.Cas. Para. 83,449 (W.D.Tenn. 1989)

Texas - *Delta Traffic Service, Inc.* v. *Texas Cartage Terminal and Warehouse Corp.*, 1988 Fed.Car.Cas. Para. 83,384 (N.D.Tex. 1988)

APPENDIX G

REPORTED COURT DECISIONS ADOPTING ICC OPINIONS THAT NEGOTIATED RATES PRECLUDE COLLECTION OF TARIFF CHARGES

Missouri - *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 705 F.Supp. 1401 (W.D.Mo. 1988)

North Carolina - *Cooper* v. *Delaware Valley Shippers Assoc.*, 1989 Fed.Car.Cas. Para. 83,466 (W.D.N.C. 1989)

Oregon - *Delta Traffic Service, Inc.* v. *Marine Lumber Co.*, 705 F.Supp. 513 (D.Ore. 1989)

Pennsylvania - *Breman's Express Company* v. *Mitchell Milling Co.*, 1988 Fed.Car.Cas. Para. 83,416 (Bkrt. Ct., W.D.Pa. 1988)

Tennessee - *Orr* v. *I.C.C.*, 703 F.Supp. 676 (W.D.Tenn. 1988)

APPENDIX H

REPORTED COURT DECISIONS REJECTING ICC'S CONCLUSIONS ON NEGOTIATED RATES ISSUE

Illinois - *Orscheln Bros. Truck Lines* v. *Zenith Electric Corp.*, 1989 Fed.Car.Cas. Para. 83,428 (N.D. Ill. 1988)

Ohio - *Delta Traffic Services, Inc.* v. *Synthetic Products Co.*, 1988 Fed.Car.Cas. Para. 83,408 (N.D.Ohio 1988)

Minnesota - *INF, Ltd.* v. *Spectro Alloys Corp.*, 690 F.Supp. 808 (D.Minn. 1988)

Mississippi - *Robinson Truck Lines, Inc.* v. *Baldor Electric Co.*, 1988 Fed.Car.Cas. Para. 83,399 (Bkrt.Ct., N.D.Miss. 1988)

Pennsylvania - *Branch Motor Express Co.* v. *Caloric Corp.*, 1989 Fed.Car.Cas. Para. 83,445 (E.D.Pa. 1989)